IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-395

JOHN W. NORMAN, et al.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT
Missouri Pacific Railroad Company in Opposition

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas, Western Division, is unreported. The opinion of the Court of Appeals is reported at 497 F.2d 594. Both opinions are set forth in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the denial of a monetary award to black employees who, because of their retirement, cannot establish that they were members of a class of employees discriminated against, or that they have suffered financial loss as a result of a discriminatory employment practice, constitutes an abuse of discretion under Title VII of the Civil Rights Act of 1964.

STATUTORY PROVISION INVOLVED

United States Code, Title 42:

§2000e-5(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and orders such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was

suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

The Complaint in this case was filed December 30, 1966, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* by ten black individuals who alleged that Defendant Missouri Pacific Railroad Company had discriminated against plaintiffs, because of their race, in initially assigning them to the craft of train porter and in thereafter failing to afford train porters all of the rights and privileges afforded to members of the separate and distinct craft of brakemen.[1] Missouri Pacific denied that it had practiced racial discrimination in employment matters, denied that the job duties and responsibilities of train porters were functionally identical to those of brakemen and asserted that since the plaintiffs in effect demanded a merger of the crafts of train porter and brakeman with which the Railroad was obliged to treat separately,[2] only the National Mediation Board under the Railway Labor Act had jurisdiction over the matters asserted. In an unreported decision of the District Court, the Complaint was dismissed on jurisdictional grounds but that judgment was vacated by the Court of Appeals which held that plaintiffs had stated a cause of action under Title VII. *Norman v. Missouri Pacific Railroad Company*, 414 F.2d 73 (8th Cir. 1969).

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[1] Historically, train porters were treated as a separate craft classification, were represented by their own certified collective bargaining representative (The Brotherhood of Sleeping Car Porters), and were protected by a contract separate and distinct from that governing the rights and obligations of brakemen. Brakemen were traditionally represented by the Brotherhood of Railway Trainmen, predecessor of the United Transportation Union which now represents brakemen and which has been made a party to this case. See generally *Norman v. Missouri Pacific Railroad Company*, 414 F.2d 73 (8th Cir. 1969).

[2] 45 U.S.C. § 152, Ninth.

After the remand of this case, it remained on the docket of the District Court with the consent of the parties pending final resolution of a virtually identical case against the "Frisco" Railroad, styled *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973) (hereinafter *"Frisco"*).

In *Frisco*, the United States Court of Appeals for the Eighth Circuit, *en banc*, held that by the continuing maintenance and recognition of the two separate craft classifications for train porters and brakemen, Negro train porters had been discriminated against on the basis of their race and that the effects of such discrimination continued to adversely affect Negro train porters, who upon the widespread discontinuance of passenger train service, were permitted to transfer into the brakemen craft only by forfeiting previously acquired seniority. However, the Court held that because of the "business necessity" doctrine and the fact that the job duties and responsibilities of train porters were not functionally identical to those of brakemen, a complete merger of the craft classifications would not be ordered. In order to accommodate the considerations of safety and efficiency in railroad operations, the Court directed the Railroad to establish a procedure, generally consisting of a physical examination and various training programs, by which it could be determined whether individuals previously employed as train porters were in fact qualified to work on the Railroad as brakemen. Individuals who successfully completed these procedures would be afforded the right to transfer into the craft of brakemen and to carry with them one-half of the seniority which they had acquired in their employment as train porters.[3] Since some train porters had already transferred into the craft of brakemen and were serving in that capacity at the time of the Court's opinion, these

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[3] The figure of 50% carryover seniority was based on, *inter alia*, the dissimilarity of the job duties of train porters and brakemen, and the recognition that some train porters may have preferred the work of train porter over that of brakemen. *Frisco*, 464 F.2d at 311, n. 13.

individuals would not be required to undergo the training program but would instead simply be credited with additional seniority equivalent to one-half of their previous acquired train porter tenure. The Court specifically held that the Railroad would not be obligated to hire or assign any former train porter who could not successfully complete the physical examination and training program and further stated that the Railroad would not be required to assign more than one former train porter to any one particular railroad crew. A monetary award of backpay was denied.

Thereafter, the parties here agreed that this case should be disposed of in accordance with the rationale of the Court of Appeals in *Frisco*. Thus, on December 19, 1973, the United States District Court for the Eastern District of Arkansas, Western Division, entered its order in this case and thereby directed Missouri Pacific Railroad Company to afford its former train porters the rights and remedies specified in the *Frisco* opinion. The District Court also disposed of two issues on which the parties were unable to agree, viz. claims of retired train porters for increased retirement benefits and for the assessment of their attorneys' fees against the defendant. The District Court awarded attorneys' fees but denied plaintiffs' claim for increased retirement benefits. Plaintiffs then appealed the issue of retirement benefits to the Court of Appeals for the Eighth Circuit. In essence, the retired train porters contended[4] that brakemen received higher pay than train porters, that had train porters been permitted to transfer crafts earlier[5] they would have had greater

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[4] Although the train porters were afforded an opportunity to present factual data regarding this claim (see September 8 and November 6, 1973 letters from the United States District Judge to counsel for train porters, A. 42-43), they did not do so. No evidentiary record has ever been made in this case and there is thus no record support for petitioners' "factual" assertions. (Citations to "A" are to the Appendix in the Court of Appeals.)

[5] Actually, transfers were permitted but with loss of seniority acquired while working in the former craft.

earnings at retirement, that under the Railroad Retirement Act retirement pay is affected by the amount of earnings during employment, and that therefore train porters should receive some monetary award[6] to compensate for this alleged differential in the retirement pay of train porters and brakemen. In *Norman v. Missouri Pacific Railroad Co.*, 497 F.2d 594 (8th Cir. 1974), the Court of Appeals affirmed the decision of the District Court, relying largely on the rationale of *Frisco*.

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[6] In a November 6, 1973 letter to counsel, the District Judge announced his tentative ruling on the two unresolved issues. As to the retirement pay claim, the District Judge stated: "The Court is persuaded that the issue of retirement benefits is controlled by section IV of the *Frisco* opinion, * * * Furthermore, plaintiffs' difficulties are compounded by the apparent inability of the Court to extract the relief requested from a party before the Court. See Memorandum of United Transportation Union, filed October 23, 1973." See Appendix 2 to Brief for Appellee Missouri Pacific Railroad Co., filed in the Court of Appeals. Both the United Transportation Union and the Railroad contend that under the statutory scheme provided in The Railroad Retirement Act, 45 U.S.C.A. § 228, *et seq.*, the Railroad Retirement Board has exclusive jurisdiction to determine entitlement to an annuity and the amount thereof (See 45 U.S.C.A. § 228j(b) (1, 2 and 3)) and would be an indispensable party to any litigation seeking increased benefits.

ARGUMENT

Petitioners predicate their request for review on an asserted conflict in the decision of the Court of Appeals for the Eighth Circuit in this case with decisions from other courts of appeal. However, respondent respectfully submits that the basis upon which the Court of Appeals disposed of petitioners' claims involves no direct conflict with the decisions cited by petitioners from other circuits; nor does this case involve any important question of federal law warranting review by this Court.

We note initially that petitioners here do not purport to represent a *class* of Negroes similarly situated—the complaint involves claims asserted by ten individual employees of the Railroad. Moreover, as of the time when the Court of Appeals for the Eighth Circuit first considered this case (the jurisdictional issue), three of the named plaintiffs had retired from service, three had been transferred to the craft of brakemen (without "carryover" seniority) and only four continued their employment as members of the craft of train porters. See *Norman v. Missouri Pacific Railroad Co.*, 414 F.2d 73, 75 n.1 (8th Cir. 1969). Later, in their proposed findings of fact submitted to the United States District Court on April 20, 1972, the petitioners stated that seven of the ten plaintiffs had retired and that only three were currently employed by the Railroad, all of the latter three having transferred to other crafts. (A. 37).

In its broadest scope, this case presents issues as to the proper approach for the federal courts to take in prescribing relief in cases brought under Title VII of the Civil Rights Act of 1964. There is certainly no dispute that federal courts possess wide discretion in fashioning decrees to afford relief consistent with the Act. See e.g. *United States v. St. Louis-San Francisco Railway*, 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U. S. 1107 (1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), cert. denied 404 U.S. 984 (1971); *Par-*

ham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970). Nor is there any real dispute as to the basic rules governing the award of backpay under 42 U.S.C. § 2000e-5(g). Backpay is one possible form of relief in suits brought under the Act, but the Act itself explicitly recognizes that the grant of such relief is discretionary. Section 2000e-5(g) provides that in fashioning relief for unlawful employment practices, the Court "*may* include reinstatement or hiring of employees, *with or without backpay*. . . ."

Thus, the cases (including those relied on in the petition for a writ of certiorari) recognize as they must that the award of backpay in a Title VII case is discretionary. See e.g. *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974); *United States v. Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973); *Jinks v. Mays*, 464 F.2d 1223, 1226 (5th Cir. 1972); *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969). It is true that some of the relevant decisions reflect differences in the description of the parameters of this discretion, particularly with reference to the issue of whether or not good faith conduct on the part of the defendant is an appropriate consideration. Compare *United States v. St. Louis-San Francisco Railway, supra* and *United States v. N.L. Industries*, 479 F.2d 354 (8th Cir. 1973) with *Pettway v. American Cast Iron Pipe Co., supra*.

However, the extent to which a defendant's good faith may be considered in determining the propriety of a backpay award is not the determinative issue here, and is one which this Court would probably not reach should certiorari be granted. As the Court of Appeals noted below, after observing that its prior cases had permitted consideration of a defendant's good faith, nevertheless in this instance, "Even a contrary position regarding the relevance of bad faith would not repudiate our determination in *Frisco* nor effect Frisco's applicability to this case, for an adequate and independent ground sustains the result

reached. . . ." *Norman v. Missouri Pacific Railroad Company*, 497 F.2d at 594, 597.

This alternative ground warranting the denial of backpay[7] is predicated on the Court of Appeals' recognition (both in *Frisco* and in the opinion below) that train porters were not automatically entitled to transfer into the craft of brakemen. As the Court stated below:

> "Additional qualifications were essential to the remedial right (of plaintiffs) to membership in the class of brakemen. In order to demonstrate entitlement to relief, each plaintiff was required to establish that he possessed the qualifications for a brakeman. Absent the possession of those qualifications, a plaintiff had not been the subject of the alleged racial discrimination. Backpay was refused because there was no ascertainable standard for judging whether present unqualified train porters would otherwise have been qualified during the course of their employment to be brakemen but for racial discrimination. No standard could determine the right to backpay itself nor the date from which to compute any right to backpay." 497 F.2d at 597.
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> ". . . The parties here have likewise recognized the functional non-equivalence of the two crafts. *Eligible* train porters were permitted a right to transfer crafts. However, some train porters who are now retired might never have been qualified to be brakemen even without any racial discrimination. They are not thus subjects of past discrimination and are not entitled to relief in the form of enhanced retirement benefits. Other train porters

[7] For the purpose of considering the propriety of petitioners' retirement pay claims, both courts below have treated the claims as indistinguishable from the more usual "back pay" claims, i.e. for lost wages.

> now retired who are unqualified to be brakemen, cannot establish the retrospective dates of the onset of their non-qualification with sufficient certainty to permit the imposition of additional retirement benefits. Because of retrospective qualification for the brakemen craft is impossible to measure in the present, no ascertainable standard exists to govern the past right to have been a brakeman nor to establish a date from which any possible retirement benefits could have been computed." *Ibid.*

There is no real inconsistency in the above rationale and the principles enunciated in cases from other circuits cited by petitioners. For example, in *United States v. Georgia Power Company, supra,* the Court stated the issue as follows, citing *Jinks v. Mays,* 464 F.2d 1223, 1226 (5th Cir. 1972):

> "But, back wages are not to be automatically granted whenever a person is ordered reinstated. The wages sought must be 'properly owing to the plaintiffs.' This requires positive proof that plaintiff was ordinarily entitled to the wages in question and, being without fault, would have received them in the ordinary course of things but for the inequitable conduct of the party from whom the wages are claimed." 474 F.2d at 922.

To the same effect, *Baxter v. Savannah Sugar Refining Company,* 495 F.2d 437 (5th Cir. 1974), cert. denied 43 L.W. 3306 (1974), stated in the context of a class action:

> "Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and is thus entitled to backpay or other appropriate relief." 495 F.2d at 444.

Even *Pettway v. American Cast Iron Pipe Company, supra,* (perhaps the case which most narrowly limits a court's dis-

cretion in this area), observed that an employee seeking a backpay award has the initial burden "to bring himself within the class (discriminated against) and to describe the harmful effect of the discrimination on his individual employment position." 494 F.2d at 259.

These principles manifest a consistent approach throughout the circuits, and one which effectively precludes a backpay award here. Train porters now retired as such simply have not, and can not, establish that they were a member of the class discriminated against. As was observed in the concurring opinion in *Frisco*, ". . . since the crafts are not functionally identical the Court cannot assume that *all* porters are qualified to be brakemen." 464 F.2d at 312. In order for the petitioners here to be granted the relief they seek, not only would the Court have to assume that all of the currently retired porters *desired*[8] brakemen positions *and* could have passed the physical examination and training programs specified by the Court as prerequisite to the right to transfer crafts—the Court would also have to resort to sheer conjecture in order to select a date in the past when the transfer would have been effected. Otherwise no determination could be made as to the beginning of the period for which additional relief would be granted.

Petitioners have not demonstrated any conflict, significant to this case, in the decisions of the various courts of appeal. The pivotal issue here is whether on the peculiar facts of this case (where safety and efficiency considerations for one craft of workers significantly differs from that of another, where members of one craft would because of the doctrine of business necessity be required to establish through physical examination and training programs their entitlement to move into the other craft, and where a significant number of the members of one craft have retired from active employment and would thus be un-

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[8] See Note 3, *supra*.

able to satisfactorily complete the prerequisites to craft transfer), the courts below abused their discretion in denying a back-pay award. Respondent submits they clearly did not. Since the peculiar factual circumstances govern resolution of the case, there is no important federal question of general application to suits under Title VII. Finally, the absence of an evidentiary record mitigates against review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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